88-1418

FEB 21 1989

No. __-___

IN THE

Supreme Court of the United States

October Term, 1988

RAYMARK INDUSTRIES, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Federal Circuit

PHILIP A. TALMADGE*
ALLEN R. SAKAI
Of Karr Tuttle
Campbell, P.S.
Attorneys for
Petitioner

1201 Third Avenue
Suite 2900
Seattle, WA 98101
(206) 223-1313

*Counsel Of Record

February 17, 1989

ABC Legal Printers Seattle WA

Questions Presented for Review

(1) Where substantial evidence was presented of a special relationship between the United States and Raymark Industries, Inc., a company that supplied asbestos cloth to a United States naval shipyard in conformity with United States government regulations and specifications, did the court below err in determining that Raymark failed to state a claim for indemnity and/or contribution against the United States under the Federal Tort Claims Act?

(2) Did the court below err in dismissing Raymark's claims for contribution and/or indemnity against the United States under the Federal Tort Claims Act and the Longshore and Harbor Workers' Compensation Act?

(3) Did the court below err in dismissing Raymark's claims for contribution and/or indemnity against the United States under the Tucker Act where the United States had superior knowledge to Raymark regarding the potential hazards of asbestos inhalation?

Parties to This Proceeding

The petitioner is Raymark Industries, Inc. f/k/a Raybestos-Manhattan.

Eagle-Picher Industries, Inc. will likely file its own Petition for Writ of Certiorari in this case.

The respondent is the United States of America.

Table of Contents

	Page
Questions Presented for Review	i
Parties To This Proceeding	ii
Table of Authorities	v
A. Opinions of the Court Below ...	1
B. Statement of Jurisdictional Grounds	1
(1) Date of Judgment	1
(2) Date of Order on Rehearing	1
(3) Statutory Provision	2
C. Statutes At Issue In This Case	2
D. Statement of the Case	2
E. Argument	14
(1) The Federal Circuit Acted Contrary to Established Washington Law in Finding That a Federal Tort Claims Act Cause of Action Was Not Stated By Raymark Based on the Special Relationship Doctrine	14
(2) The Court Below Acted Contrary to United States Supreme Court Case Law in Finding That Mr. Lopez's Claim Must Be Recognized Under Federal Admiralty Law in Order For Raymark to Prevail Under the Fed-	

Page

eral Tort Claims Act and the Longshore and Harbor Workers' Compensation Act 18

(3) The Federal Circuit Acted Contrary to Established Federal Common Law in Finding That a Tucker Act Claim was not Stated by Raymark Based on the Superior Knowledge Doctrine 24

F. Conclusion 30

Appendix .....

Table of Authorities

Table of Cases

	Page
American Ship Building Co. v. United States, 654 F.2d 75 (Ct. Cl. 1981)	26,27
Church of Scientology of California v. Flynn, 744 F.2d 694 (9th Cir. 1984)	26
Director, Office of Workers' Compensation Programs, United States Dept. of Labor v. Perini North River Associates, 459 U.S. 297, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983)	20,21, 22,23
Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972)	21,22
Glass v. Stahl Specialty Co., 97 Wn.2d 880, 652 P.2d 29 (1982)	16
Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 103 S. Ct. 1033, 74 L. Ed. 2d 190 (1983)	18,19
Lopez v. A. C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988)	1,17, 24,25
Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984)	19
Olch v. Pacific Press & Shear Co., 19 Wn. App. 89, 573 P.2d 1355, rev. denied, 90 Wn.2d 1017 (1978)	16,17

Page

Seattle-First National Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 588 P.2d 1308 (1978) 16

Wright v. United States, 719 F.2d 1032 (9th Cir. 1983) 15

Statutes

28 U.S.C. § 1346(a)(2) 2,3,24

28 U.S.C. § 1346(b) 2,3,14

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2674 2,3,15

33 U.S.C. § 902(3) 2,20,23

33 U.S.C. § 902(21) 2,20

33 U.S.C. § 905(b) 2,3,19, 23

50 U.S.C. §§ 31-32 28

RCW 51.04.010 1,16

Court Rules

Sup. Ct. R. 17.1(a) 18,29,30

Sup. Ct. R. 17.1(b) 18

Sup. Ct. R. 17.1(c) 24,29,30

Fed. R. Civ. P. 12(b)(6) 26

A. OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is attached hereto as Appendix 1 and was reported as Lopez v. A.C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988).

The opinion of the United States Court of Appeals for the Federal Circuit on rehearing is attached hereto as Appendix 2 and was not reported.

B. STATEMENT OF JURISDICTIONAL GROUNDS

(1) Date of Judgment.

The judgment of the United States Court of Appeals for the Federal Circuit was rendered on September 29, 1988.

(2) Date of Order on Rehearing.

A timely motion for rehearing was filed by Eagle-Picher Industries, Inc. and was denied on November 18, 1988.

(3) Statutory Provision.

This court has jurisdiction under 28 U.S.C. § 1254(1).

C. STATUTES AT ISSUE IN THE CASE

28 U.S.C. § 1346(a)(2)

28 U.S.C. § 1346(b)

28 U.S.C. § 2674

33 U.S.C. § 902(3)

33 U.S.C. § 902(21)

33 U.S.C. § 905(b)

RCW 51.04.010

D. STATEMENT OF THE CASE

This case was initially brought in the United States District Court for the Western District of Washington at Seattle, Cause No. C84-155M. The plaintiff, Albert Lopez, filed an action against numerous defendants, all of which were manufacturers and suppliers of asbestos containing insulation products used to repair United States naval vessels at Puget Sound Naval

Shipyards in Bremerton, Washington. Mr. Lopez was a civilian pipe fitter and pipe coverer who was employed by the United States Navy at Puget Sound Naval Shipyards.

Raymark Industries, Inc. f/k/a Raybestos-Manhattan ("Raymark") was one of several suppliers of asbestos containing insulation products to Puget Sound Naval Shipyards. Prior to trial, Raymark settled Mr. Lopez's claim by payment of $7,200 to Mr. Lopez.

Raymark, along with Eagle-Picher Industries, Inc. ("Eagle-Picher") joined the United States as a third-party defendant in the case and sought contribution and/or indemnity from the United States on the basis of the Tucker Act, 28 U.S.C. § 1346(a)(2), the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2674, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) and Washington state law

supporting a claim of liability against the United States based on the special relationship between the United States and Raymark.

Raymark's claim for contribution and/or indemnity is based on the fact that the United States had a special relationship with Raymark. The United States was more than the mere purchaser of asbestos-containing insulation products as stated in the Court of Appeals unsupported findings. During the Second World War and thereafter, the United States promulgated the government contracts which specified the use of asbestos in the insulation products sold to the United States. The specifications were not performance specifications as the Court of Appeals stated but were in fact design specifications. The United States stockpiled asbestos to support the war effort and was the supplier of the raw asbestos

used by Raymark in manufacturing the asbestos containing products which were eventually sold to the United States. The United States was also the owner of the shipyard where Mr. Lopez was employed and to which Raymark delivered the asbestos containing products. The United States was Mr. Lopez's employer. The United States was the owner and operator of the naval vessels on which Mr. Lopez worked and on which Raymark's insulation products were ultimately installed.

The United States moved for summary judgment of dismissal of the third party action. As set forth in the Federal Circuit's opinion, the district court granted the motion for summary judgment and the Federal Circuit affirmed the dismissal. The motion for rehearing brought by Eagle-Picher was also denied by the Federal Circuit.

The significance of this case is much greater in scope than the $7,200 paid by Raymark to Mr. Lopez. Raymark urges this Court to accept review of this case because of its precedential value in most of the asbestos injury cases pending in the United States. At present there are thousands of cases pending in the United States representing millions of dollars in claims. Of those claims, a large percentage are claims made by shipyard workers employed by the United States and who worked on United States naval vessels.

In the cases brought by these thousands of plaintiffs, the defendants are all of the manufacturers of asbestos-containing insulation products. Of the defendants, some have filed for bankruptcy protection (for example, Johns-Manville and GAF Corporation) while others have attempted to weather the onslaught of cases with insur-

ance, massive attorneys' fees, and millions of dollars paid in settlement and judgments.

Throughout the course of the asbestos litigation in the United States, there is one entity which more than any other entity was inextricably involved with the asbestos problem and is yet almost entirely absent from the litigation. That entity is, of course, the United States.

In addition to the other factors outlined above which describe the special relationship between the United States and Raymark, the United States possessed the most knowledge of any entity or person, including Raymark, about the hazards associated with long-term exposure to asbestos through inhaling asbestos fibers contained in insulation products. By the late 1930s, the United States was already aware of the health hazards associated with the use of

asbestos in shipyards. Raymark was never informed about this special knowledge. The annual report of the Surgeon General of the United States Navy (1939) studied health hazards in the various naval shipyards, including Puget Sound Naval Shipyards. Among the Surgeon General's findings:

> Hazard of Asbestosis: Asbestosis is an industrial disease incident to the inhalation of asbestos especially for prolonged periods, and is distinct from silicosis. The development of the disease depends upon the concentration of the dust, the size of the dust particles and the length of exposure. The workers in the Pipe Covering and Insulation Shop are exposed to the inhalation of asbestos dust . . .
>
> The medical survey of the 11 employees in this Shop was conducted recently with the object of ascertaining whether asbestosis in any stage could be detected . . . However, it was not considered that the negative findings precluded the future development of asbestosis by continued exposure to present occupational conditions.

In December 1942, a "Meeting in Regard to Minimum Requirements for Industrial Health and Safety in Shipyards" was held in Chicago, Illinois before the United States Maritime Commission. At this meeting, the chairman, Dr. Philip Drinker, a United States Public Health Service employee and one of the most respected leaders in the field of industrial health stated:

> The asbestosis is caused in connection with the handling of asbestos. That is not unlike silicosis in its effects, and we rather expect it to occur in the shipyards, because we have seen asbestos being handled in installation work with little or no precautions.

In 1943, the United States Navy approved, as a result of the above referenced Chicago meeting, the "Minimum Requirements for Safety in Industrial Health and Contract Shipyards." The minimum requirements set forth standards to monitor asbestos dust, screen employees, and provide safety

instruction and equipment. These standards were never implemented. Once again, it must be emphasized that all of this information was never transmitted by the United States to the manufacturers of asbestos-containing insulation products like Raymark.

Dr. Ray Kardong, who founded the Puget Sound Naval Shipyard's Industrial Hygiene Department in 1942, confirmed the United States Navy's early awareness of a potential asbestos-related health hazard at Puget Sound Naval Shipyard. Dr. Kardong's testimony established that at least by 1942 the United States recognized the serious health hazard posed by inhalation of dust from asbestos-containing products and that respirators, annual medical exams and x-rays, and monitoring of shipyard asbestos dust levels should have been performed by the United States.

In 1944, Dr. W. C. Dreesen and W.S. Fleischer completed a study and report entitled "U.S. Navy-U.S. Maritime Commission; Report on Investigation of Asbestosis from Amosite Pipe Covering at Bath Iron Works." The Bath Iron Works study was one of several documents which was marked "classified" and not transmitted to Raymark and other asbestos product manufacturers, revealed the rate of asbestosis in the pipe covering shop of nearly 16% and a rate of abnormal x-ray findings of 30%. Dust levels were 59 parts per cubic foot or ten times the threshold limit value set by the American Conference of Industrial Hygienists in 1946 and adopted by the United States Navy's Bureau of Medicine in 1955. The Bath Iron Works study recognized that the conditions in the pipe covering shop presented a very real asbestosis hazard. The study again recommended adequate ven-

tilation, a requirement that all employees handling asbestos wear suitable respirators, and a program of medical surveillance involving periodic x-rays and examinations.

Despite all of these warnings, the United States failed to pass on this knowledge to Raymark. More tragically, the United States failed to enforce its own safety regulations at Puget Sound Naval Shipyard. Mr. Lopez, who started work at Puget Sound Naval Shipyard in 1947, testified that his employer (the United States) failed to instruct him about the possible health dangers associated with his trade until the mid-1960s. Thus, the remedies established in the early 1940s by the United States were ignored by the United States for a period of over twenty years. His testimony indicated that it became mandatory to wear a respirator in 1967 or 1968. Also, the instructions from his

employers as to the safety precautions to be followed while handling asbestos were not given until the mid-1960s. With respect to collecting dust samples, Mr. Lopez testified that the first time he actually saw such dust samples being taken was in the late 1960s.

As early as 1939, but no later than 1942, the United States was certainly aware that its policy of mandatory use of asbestos-containing products in its shipyards posed a serious potential health hazard to its shipyard employees. By then the United States was aware of and had in fact set up safety measures to protect its employees against this hazard. However, instead of implementing and enforcing those safety measures, the United States continued to require the use of asbestos pursuant to mandatory government specifications and

continued to take no steps to protect the health of their shipyard workers.

Finally, despite the superior knowledge of the United States, the potential health hazards were not disclosed and the results of the tests were classified and not revealed to Raymark.

E. ARGUMENT

(1) The Federal Circuit Acted Contrary to Established Washington Law in Finding that a Federal Tort Claims Act Cause of Action Was Not Stated by Raymark Based on the Special Relationship Doctrine.

The parties agree that the liability of the United States under the Federal Tort Claims Act ("FTCA") is governed by "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). In its analysis of the application of Washington state law to the FTCA, the Federal Circuit erroneously found that Washington law would provide no basis for a cause of action

against the United States by Raymark. The United States should be liable to Raymark for contribution and indemnity to the extent a "private individual under like circumstances" would be liable. 28 U.S.C. § 2674; Wright v. United States, 719 F.2d 1032, 1034 (9th Cir. 1983).

The United States breached an independent duty to Raymark created by the special relationship between the United States and Raymark. The Court of Appeals, contrary to the pronouncements of the Washington Supreme Court, found that absent any express contract, the United States, as Mr. Lopez's employer, was not liable to indemnify third parties such as Raymark who are obliged to pay damages to Mr. Lopez. There is no requirement under Washington law that an express contract must exist in order for there to be liability on the part of the employer. Due to the terms of Wash-

ington's Industrial Insurance Act, RCW 51.04.010, it is a rare case for which the employer will be found liable to the employee. However, such liability can be had without an express contract. The Washington Supreme Court in Glass v. Stahl Specialty Co., 97 Wn.2d 880, 885, 652 P.2d 948 (1982), supports the notion that a third party can maintain an action against an employer if that employer voluntarily assumed an independent duty or obligation to that third party. See also, Seattle-First National Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 242, 580 P.2d 1308 (1978). The Washington Court of Appeals has held that a third party action against an employer was permissible if there was an express contract, independent duty, or vicarious liability. Olch v. Pacific Press & Shear Co., 19 Wn. App. 89, 93, 573 P.2d 1355, rev. denied, 90 Wn.2d 1017 (1978).

> It has been noted, however, that when an independent duty or obligation is owed by the employer to a third party the exclusivity provisions of the workmen's compensation act will not bar recovery by the third party.

Id. at 92-93. Here, the independent duty was created by the special relationship between the United States and Raymark and cannot be so easily dismissed. The Federal Circuit characterized Raymark's argument as requiring the "buyer" to tell them (Raymark) that their product was defective, intrinsically or as actually used. Lopez v. A. C. & S., Inc., 858 F.2d at 717. The Court of Appeals opinion further states that Raymark's argument does not deal with how the United States was supposed to know that the supplier of asbestos needed any information about asbestos that it did not have. Id. Contrary to the Federal Circuit's approach to this case, the United States was not simply the "buyer" of Ray-

mark's products. The United States was much more, and to state that the United States was simply the buyer flies in the face of all the evidence before the courts below.

The Federal Court's failure to find an FTCA cause of action under Washington's doctrine of special relationship liability provides a sufficient basis on which to grant Raymark's petition for writ of certiorari under Sup. Ct. R. 17.1(a)-(b).

(2) The Court Below Acted Contrary to United States Supreme Court Case Law and in Finding that Mr. Lopez's Claim Must Be Recognized under Federal Admiralty Law in Order for Raymark to Prevail under the Federal Tort Claims Act and the Longshore and Harbor Workers' Compensation Act.

The Federal Circuit erred in finding that admiralty jurisdiction was required in order for Raymark to pursue indemnity against the United States under the FTCA and Lockheed Aircraft Corp. v. United

States, 460 U.S. 190, 103 S. Ct. 1033, 74 L. Ed. 2d 190 (1983). While there is no doubt that the Ninth Circuit rejected an asbestos worker's claim of admiralty jurisdiction in the case of Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984), that finding is not crucial to the issues before this Court. The relevant portion of the Longshore Harbor Workers Compensation Act ("LHWCA") states as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly. . . .

33 U.S.C. § 905(b). The United States, as vessel owner of the military ships on which Mr. Lopez worked, is the "vessel" against

which Raymark is entitled to bring suit. See 33 U.S.C. § 902(21). If, under the LHWCA, a third party claim could be brought against a private vessel owner, then the same claim could be brought against the United States. The key question is whether under the LHWCA Mr. Lopez is a covered employee. The definition of employee under the LHWCA is as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations and any other harbor-worker including a ship repairman, ship builder, and ship-breaker . . .

33 U.S.C. § 902(3). Mr. Lopez was such an employee even if his claim was not cognizable as a federal admiralty claim. The United States Supreme Court has stated:

> We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3) and he is covered under the LHWCA, providing, of course,

> that he is the employee of a statutory "employer," and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in the historically maritime locale, but because they are required to perform their employment duties upon navigable waters.

Director, Office of Workers' Compensation Programs, United States Dept. of Labor v. Perini North River Assocs., 459 U.S. 297, 324, 103 S. Ct. 634, 74 L. Ed. 2d 465(1983). This Court rejected the notion that LHWCA liability is premised on admiralty jurisdiction which requires satisfaction of the traditional maritime nexus as set forth in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972). The Supreme Court stated:

> There is nothing in these comments, or anywhere else in the legislative Reports, to suggest, as Perini claims, that Congress intended the status language to require that an employee injured

> upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered.

459 U.S. at 318-19. In Perini, the Court specifically referred to the Executive Jet case, and stated that reliance on that case to limit the scope of the LHWCA is unfounded.

> Perini cites our decision in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 (1972), and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on Executive Jet is misplaced. In that case, the only issue before the court was whether federal admiralty jurisdiction extended to tort claims arising out a crash of an airplane into navigable waters on a flight "within the continental United States, which [is] principally over land." . . .

> The explicit language of Executive Jet makes it clear that our discussion was occasioned by the "problems involved in applying a locality-alone test of admiralty tort jurisdiction to the crashes of aircraft" in a situation where "the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous." . . . In addition, Churchill [the claimant in Perini], as a marine construction worker, was by no means "fortuitously" on the water when he was injured.

459 U.S. at 320, n.29. Because Mr. Lopez's injury occurred during the course of his employment on navigable waters, the maritime employment requirement of 33 U.S.C. § 902(3) is satisfied and the court below should not have dismissed Raymark's claim for indemnity and contribution based on vessel owner liability set forth in the LHWCA. 33 U.S.C. § 905(b). The Federal Circuit did not cite the Perini case and its finding is directly contrary to the holding of the United States Supreme Court

in the Perini case; thereby providing a basis on which to grant Raymark's petition for writ of certiorari under Sup. Ct. R. 17.1(c).

(3) The Federal Circuit Acted Contrary to Established Federal Common Law in Finding That a Tucker Act Claim was Not Stated by Raymark Based on the Superior Knowledge Doctrine.

Under the Tucker Act, 28 U.S.C. § 1346(a)(2), the court below recognized the availability of a claim under the doctrine of superior knowledge. Yet, within the framework of the special relationship between Raymark and the United States, it is inconceivable how the Federal Circuit could have dismissed Raymark's claim as to superior knowledge with an unsupported presumption:

> We must presume that government officials acted in good faith, the contrary not being alleged. Acting in good faith they could not have knowingly exposed their own employees to undue asbestos hazards. Maybe they had a duty to know more than they did, e.g.,

> to follow up clues to danger they actually had received. Raymark and Eagle-Picher have asserted then, not only the duty of a customer to inform the supplier that his product is defective, but a duty to find out what he does not already know.

Lopez v. A. C. & S., Inc., 858 F.2d at 717-18. That is precisely the claim made by Raymark. Not only was the United States the owner of the vessels being repaired, the owner of the shipyard, the employer of Mr. Lopez, the purchaser of asbestos products, the stockpiler and supplier of raw asbestos, the promulgator of the specifications for asbestos containing products, but the United States also had superior knowledge as to the hazards of asbestos inhalation and did not reveal that knowledge to Raymark nor did it enforce its own safety standards in order to provide Mr. Lopez with a safe place to work. There is no basis on which to presume that

government officials acted in good faith. In fact, the contrary was alleged. The Federal Circuit, in reviewing a case resolved on a Fed. R. Civ. P. 12(b)(6) motion, has inexplicably presumed that the facts asserted by the moving party (the United States) are true, contrary to the accepted view that the court must accept the facts of the non-moving party (Raymark) as true. See Church of Scientology of California v. Flynn, 744 F.2d 694, 696 (9th Cir. 1984).

Based on the evidence before the courts below, it is clear that the United States did knowingly expose their own employees to undue asbestos hazards. In fact, the United States waited twenty years before implementing and enforcing their own safety regulations.

The court below correctly cited the case of American Ship Building Co. v.

United States, 654 F.2d 75 (Ct. Cl. 1981), to set out the standards for a superior knowledge claim by Raymark.

> The doctrine of superior knowledge is generally applied to situations where (1) the contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specifications supplied misled the contract, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

Id. at 79. Yet, the Court below presumed certain unsupported facts and found the doctrine unavailable to Raymark. The Federal Circuit even stated that Raymark claimed that the United States had a duty not only to inform Raymark of its product's deficiencies but to find out what Raymark did not already know. Yet Raymark does not and has never urged the Court to impose such a duty on the United States. Raymark

simply asks that the Court find that under the circumstances, the United States should have revealed the knowledge it already had regarding asbestos exposure. This superior knowledge gained from years of testing of shipyard employees who worked with asbestos containing insulation products was withheld from Raymark under the guise of "classified information" and the use of laws such as the Espionage Act, 50 U.S.C. §§ 31-32, which imposed criminal penalties if anyone were to reveal the contents of the studies to unauthorized persons. By classifying the documents, the United States must have known that Raymark did not have the knowledge that it had regarding the hazards of asbestos.

With respect to the contract specifications themselves, the part of the specifications which misled Raymark was the specification calling for asbestos to be

included in the product without providing Raymark with information regarding the health risks associated with inhalation of asbestos fibers. Using the Federal Circuit's rationale, it was safe for Raymark to presume the government was acting in good faith by demanding asbestos, supplying the asbestos, and therefore, Raymark was not put on notice to make inquiry into the safety of shipyard employees using asbestos products. This presumption was, of course, wrong. However, the United States already knew that the use of asbestos was harmful but did not reveal that information to Raymark.

Failure by the court below to find a valid Tucker Act claim by Raymark under the superior knowledge doctrine is contrary to prior federal appellate decisions and is sufficient grounds under Sup. Ct. R.

17.1(a), (c) for this Court to grant Raymark's petition for writ of certiorari.

F. CONCLUSION

Based on the foregoing as well as those grounds set forth by Eagle-Picher in its petition for writ of certiorari (which Raymark hereby joins), Raymark requests that this Court grant its petition for writ of certiorari.

Respectfully submitted this 15th day of February, 1989.

PHILIP A. TALMADGE
ALLEN R. SAKAI
Of Karr Tuttle Campbell
Attorneys for Raymark Industries, Inc.

1201 Third Avenue
Suite 2900
Seattle, WA 98101-3028
(206) 223-1313

APPENDIX 1

United States Court of Appeals for the Federal Circuit

87-1543 and 87-1544

ALBERT LOPEZ and SHIRLEY LOPEZ,
Plaintiffs,

and

RAYMARK INDUSTRIES, INC. and EAGLE-PICHER INDUSTRIES, INC.,

Defendants/Third-Party-
Plaintiffs/Appellants,

v.

A. C. & S., INC.; AMERICAN ASBESTOS TEXTILE CORP., a/k/a AMATEX CORP.; ARMSTRONG CORK, INC.; ASARCO, INC.; CAREY CANADA, INC.; THE CELOTEX CORP., successor in interest to PHILIP CAREY MANUFACTURING CO., PHILIP CAREY CORP., BRIGGS MANUFACTURING CO., and PANACON CORP.; COMBUSTION ENGINEERING INC.; CROWN CORK & SEAL CO.; FIBREBOARD CORP.; THE FLINTKOTE CO.; FORTY-EIGHTY INSULATION, INC.; GAF CORP., successor by merger with RUBEROID CO.; GARLOCK INC., JOHNS-MANVILLE SALES CORP.; J.P. STEVENS, INC.; KEENE CORP., successor by merger with BALDWIN-EHERT-HILL a/k/a ASTEN HILL; NICOLET INDUSTRIES; OWEN-CORNING FIBERGLAS CORP.; OWENS-ILLINOIS CORP.; OWENS ILLINOIS GLASS; PITTSBURGH CORNING CORP.; RAYBESTOS-MANHATTAN; SOUTHERN TEXTILE; STANDARD ASBESTOS; UNION ASBESTOS; RUBBER CO. a/k/a UNARCO INDUSTRIES, INC.,

Defendants,

v.

UNITED STATES OF AMERICA,

Third-Party-Defendant/
Appellee.

United States Court of Appeals for the Federal Circuit

87-1543 and 87-1544

ALBERT LOPEZ and SHIRLEY LOPEZ,

Plaintiffs,

and

RAYMARK INDUSTRIES, INC. and EAGLE-PICHER INDUSTRIES, INC.,

Defendants/Third-Party Plaintiffs/Appellants,

v.

A. C. & S., INC.; AMERICAN ASBESTOS TEXTILE CORP., a/k/a AMATEX CORP.; ARMSTRONG CORK, INC.; ASARCO, INC.; CAREY CANADA, INC.; THE CELOTEX CORP., successor in interest to PHILIP CAREY MANUFACTURING CO., PHILIP CAREY CORP., BRIGGS MANUFACTURING CO., and PANACON CORP.; COMBUSTION ENGINEERING INC.; CROWN CORK & SEAL CO.; FIBREBOARD CORP.; THE FLINTKOTE CO.; FORTY-EIGHTY INSULATION, INC.; GAF CORP., successor by merger with RUBEROID CO.; GARLOCK INC., JOHNS-MANVILLE SALES CORP.; J.P. STEVENS INC.; KEENE CORP., successor by merger with BALDWIN-EHERT-HILL a/k/a ASTEN HILL; NICOLET INDUSTRIES; OWEN-CORNING FIBERGLAS CORP.; OWENS-ILLINOIS CORP.; OWENS ILLINOIS GLASS; PITTSBURGH CORNING CORP.; RAYBESTOS-MANHATTAN; SOUTHERN TEXTILE; STANDARD ASBESTOS; UNION ASBESTOS; RUBBER CO. a/k/a UNARCO INDUSTRIES, INC.,

Defendants,

v.

UNITED STATES OF AMERICA,

Third-Party-Defendant/
Appellee.

Philip A. Talmadge, Karr, Tuttle, Koch, Campbell Mawer, Morrow & Sax, P.S., of Seattle, Washington, and Joe G. Hollingsworth, Spriggs, Bode & Hollingsworth, of Washington, D.C., argued for defendants/third-party-plaintiffs/appellants. Allen R. Sakai, of Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, P.S., and Paul G. Gaston and Edward M. Fogarty, Spriggs, Bode & Hollingsworth, were on the brief, of counsel. David S. Fishback, Sr. Trial Counsel, and H. Michael Semler, Department of Justice, of Washington, D.C., argued for third-party-defendant/appellee. With them on the brief were Richard K. Willard, Assistant Attorney General, J. Patrick Glynn, Director, Harold J. Engel, Deputy Director, JoAnn J. Bordeaux, Assistant Director Henry Miller, Trial Attorney, Gene S. Anderson, United States Attorney, and Joseph B. Cox, Jr., Assistant Director, Torts Branch, Civil Division.

Robert M. Bruskin, James F.C. Worrall and Harvey G. Sherzer, Howrey & Simon, of Washington, D.C., Dennis H. Markusson, Robert D. Batson, Nancy E. Stead, and Richard E. Maunier, Manville Corporation, of Denver, Colorado were on the brief for Amicus Curiae Johns-Manville Sales Corporation.

Paul A. Zevnik, Kaye, Scholer, Fierman, Hays and Handler, of Washington, D.C., and Max Gitter and Stuart M. Cobert, Paul, Weiss, Rifkind, Wharton & Garrison, of New York, New York, were on the brief for Amicus Curiae GAF Corp.

Appealed from: U.S. District Court for the Western District of Washington at Seattle

Judge McGovern

DECIDED: September 28, 1988

Before MARKEY, Chief Judge, RICH, Circuit Judge, NICHOLS and BENETT, Senior Circuit Judges, and ARCHER, Circuit Judge.

NICHOLS, Senior Circuit Judge.

This is a test case,* appealed from the United States District Court for the Western District of Washington (McGovern, C.J.), Civil Action No. C84-155M, representative of numerous claims by present or

---

* The only parties on appeal are Raymark and Eagle-Picher.

former workers at the Puget Sound Naval Shipyard (PSNS), or their widows, against companies which supplied to the United States Navy products for insulation on shipboard that contained asbestos. Lopez was a civilian pipe fitter, pipe coverer, and insulator at PSNS from 1947 to 1984. Of numerous defendants, Raymark and Eagle-Picher settled with Lopez for $7,200 and $10,000, respectively, for disabilities supposed to result from breathing air-borne asbestos dust, presumably, for purposes of this case, from products supplied to PSNS by Raymark and Eagle-Picher. Lopez also received an award from his employer, the United States, under the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8101-93, but pursuant to section 8132, was required to refund it. See United States v. Lorenzetti, 467 U.S. 167 (1984). Raymark and Eagle-Picher joined the United

States as a third-party defendant and seek to be indemnified or reimbursed, in whole or in part, for their settlement payments and litigation expenses.

Lopez originally filed his suit in state court, but defendants removed it to federal court (W.D. of Washington), on diversity. The asserted grounds of federal liability to Raymark and Eagle-Picher were the Tucker Act, 28 U.S.C. § 1346(a)(2), as to claims founded on contracts implied in fact, and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-80, as to claims sounding in tort. The government, having successfully invoked 5 U.S.C. § 8132 to shift its loss to Raymark and Eagle-Picher, naturally does not welcome their effort to shift it back under the above two statutes. Its motion to dismiss or for summary judgment elicited a judgment of dismissal by the district court, which

is the decision the appeal requires us to review. It is reported as Lopez v. Johns-Manville, 649 F. Supp. 149 (W.D. Wash. 1986).

The appeal was originally filed with the Ninth Circuit, but is here because of the presence of Tucker Act claims and the rule of construction of 28 U.S.C. § 1295(a)(2) laid down in United States v. Hohri, 107 S. Ct. 2246 (1987). See In re All Asbestos Cases, 849 F.2d 452 (9th Cir. 1988). The briefs were originally prepared for the Ninth Circuit and came here with the rest of the case. They were supplemented here. There are amicus briefs. We have carefully considered all briefs and heard oral argument on behalf of Raymark and Eagle-Picher separately. Our conclusion is that we affirm the judgment of the district court, though not in all respects on the same reasoning. As to the Tucker

Act claims, we affirm primarily on the basis of our own case law as we are meant to be the primary or sole source of case law construing that act since our establishment. United States v. One (1) 1979 Cadillac Coupe de Ville, 833 F.2d 994, 997 (Fed. Cir. 1987). As to the Tort Claims Act claims, we look primarily to the law of the Ninth Circuit, since such claims are here only as pendants to other claims. Molins PLS v. Quigg, 837 F.2d 1064, 1066, 5 USPQ2d 1526, 1527 (Fed. Cir.), cert. denied, 108 S. Ct. 2822 (1988).

Discussion

Tucker Act Jurisdiction

Since the statutory basis of our jurisdiction is the presence of Tucker Act claims under 28 U.S.C. § 1346(a)(2), we consider them first. The government, of course, purchased products containing asbestos under written contracts and pur-

chase orders, but the case has proceeded in a partial vacuum so far as concerns the specific texts, and in view of the lapse of time, it may be impossible now to produce them all. Some are known. It is reasonable to suppose, and the district court did suppose, they specified what asbestos the purchased products should contain, as asbestos was the most effective insulating element, and its perils, that made its use so undesirable, were only beginning to be known at the time of Lopez's first employment. On the other hand, from the arguments on behalf of Raymark and Eagle-Picher, we assume it is not now contended that the contracts or purchase orders contained any written warranties to sellers; it would be surprising indeed to see express warranties running from the buyer to the seller, especially when their legality would have been in doubt, as the

able district court supposed. We are considering implied warranties.

The theory is that in specifying asbestos, the government made an implied warranty to sellers that its own use of the products would not expose the sellers to unforeseen defective product liabilities to persons who might be injured by breathing clouds of asbestos dust, lethal as we now know such clouds to be.

The decision of the district court implies that a contract action on such a theory is simply not available to sellers to the government under the Tucker Act. If the decision does not rest on a broad range of possible factual assumptions, under the pleadings, it cannot be sustained.

The court quotes Santisteven v. Dow Chemical Co., 506 F.2d 1216 (9th Cir. 1974), which rejects the supposed liability of a buyer to a seller, not to use a dan-

gerous substance in a manner to expose the seller to liability to the buyer's employees. The analysis, however, deals with tort law and that of contracts implied at law, while for Tucker Act jurisdiction the claimant must allege a contract obligation implied in fact. The Tucker Act, as the court correctly states, does not confer jurisdiction of claims against the United States on contracts, implied at law, they must be implied in fact. Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980); Merritt v. United States, 267 U.S. 338 (1925).

The asbestos suppliers, in the numerous cases now pending which seek indemnity from the United States against their liability to United States employees, frequently mention two cases that were brought under the Tucker Act, and do enforce warranty contracts implied in fact, running from

buyer to seller. We will add a third, and there are others.

The first and most famous is United States v. Spearin, 248 U.S. 132 (1918). Spearin had contracted to build a drydock at a navy yard (as Naval shipyards used to be called). The government, according to its custom, required construction contractors to build according to very detailed plans and specifications. Spearin was required to relocate a sewer according to plan, but the plan was defective in that it required Spearin to make the sewer, as relocated, discharge into another sewer which, as the plan failed to show, was itself blocked. The result was disaster. The Court (Brandeis, J.), said at 136:

> But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.

And, at 137:

> But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. [Footnotes omitted.]

The case establishes a principle of broad application, but it is obvious a construction contract, with its massive detail all prescribed by the owner, supports a fact implication in a way a mere supply contract could hardly ever do, except one which exacts a like conformity to the buyer's prescription of detail. One which did is also frequently cited: Ordnance Research, Inc. v. United States, 609 F.2d 462 (Ct. Cl. 1979). The contract was for production of igniters for fire bombs. This involved

blending some very volatile explosives. The government had experience making these igniters; the plaintiff had none. The government provided very detailed specifications how to do it, but they were defective and in following them, plaintiff experienced a series of disastrous explosions with loss of life. The court held the government warranted -- as we have seen, by an implication of fact -- that if its instructions were followed, safe blending could be achieved. The specifications were in fact defective and in breach of the warranty.

In USA Petroleum Corp. v. United States, 821 F.2d 622 (Fed. Cir. 1987), the government contracted for several deliveries of petroleum by the vendor. It required that it determine the quantity delivered by each tanker load according to measurement means it provided. The means

were defective and overpayments ensued which the contractor passed on to its suppliers and could not recover, yet the government demanded refund of its overpayments when the defects were at length discovered. It was not a very difficult deduction of fact, that in exacting use of its measurement means, the government impliedly warranted that its measurements means were correct.

It was characteristic of these cases that the circumstances strongly supported a factual inference that a warranty was implied. The counsel for asbestos suppliers here seem to think it is enough for a Spearin warranty that the government specified any characteristic at all in the merchandise it purchased. They do not know and cannot tell us whether the government specifications differed at all from those of private customers of Raymark and Eagle-

Picher, or if they did, whether the difference related to the asbestos content of the material supplied. We know, as a matter of judicial notice today, that all insulating material containing asbestos is hazardous, that supplied to government and private customers alike. We can assume this was not so well known when the material was ordered. Even in a "reverse warranty" claim by an asbestos supplier against a private company, where the concept of implied warranty is not confined to implied in fact cases, it has been held the alleged warranty cannot be implied. White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981).

This court has held that a Spearin-type warranty is implied only in design specifications, not performance specifications. Stuyvesant Dredging Co. v. United States, 834 F.2d 1576, 1583 (Fed. Cir. 1987). It

is not explained how any supposititious specifications for asbestos-containing insulating material could have been of the design type. Judge McGovern had held the government asbestos specifications were performance specifications, and this holding is not appealed. When a construction contract is not involved, as in Ordnance Research, some other provision telling just how to do the job, takes the place of literal design. The contractor has a right to rely on an "indicated method of manufacturing the end product." Natus Corp. v. United States, 371 F.2d 450, 455 (Ct. Cl. 1967). It is not shown how the government could have supposed it needed to tell Raymark and Eagle-Picher how to make asbestos insulation, or how they needed to rely on such instructions.

In the absence of allegation or showing of circumstances requiring a conclusion

that a Spearin warranty was implied, the asserted warranty would be, if it had judicial approval, implied at law, not fact, and a Tucker Act court would lack jurisdiction to imply it. As a matter of an implication of fact, an implied warranty relating to the use by the buyer after delivery, and warranting it would not harm the seller is novel, and no reason is shown why anyone could have so supposed at the date of sale by any inference from the circumstances. It would be just as reasonable for the parties to the sale to have implied a warranty by the seller, that apart from dangers the seller warned of, the insulation would not endanger the buyer or its employees. Either way it would be a warranty implied in law, not fact.

The Anti-Deficiency Act

The district court also relied on the Anti-Deficiency Act, 31 U.S.C. § 1341,

which provides that no government official may make or authorize an expenditure in excess of an available appropriation, or make a contract obligating money before an appropriation is made unless authorized by law. The reasoning of the court is that an express warranty to suppliers of asbestos products, of the kind asserted, would be illegal, and therefore an implied warranty must be so too. We have doubts about this, and as we need not rely on it, we do not do so. An express warranty would be a thing of value in addition to the purchase price. The contracting officer could pay money out if he found the warranty required it. On the other hand, a Spearin-type implied warranty is, if breached, enforceable only in the courts. At times, as in Ordnance Research, supra, it is enforceable under contract changes articles and no breach of the contract necessarily occurs, but if a

contracting officer were going to issue a change order settling a claim, he would be limited to appropriated funds then available. However, appeal boards by the Contract Disputes Act of 1978, 41 U.S.C. § 607(e), can grant any relief the Claims Court could grant, i.e., including damages in breach cases. There is a standing appropriation to pay court judgments and appeal board awards, 31 U.S.C. § 1304, so courts and boards, in rendering judgment, are not required to investigate whether program funds are available. In the circumstances, we are reluctant to found our holding on the Anti-Deficiency Act, and to do so would severely hamper the enforcement of Spearin-type warranties in the courts. Our appreciation of the bizarre and novel nature of the "reverse warranty" here asserted, and its lack of support in the alleged facts or the court decisions, does

not require recourse to the Anti-Deficiency Act to persuade us that the Tucker Act does not provide means to enforce the alleged warranty here. If implied at all, it is not implied in fact. Raymark and Eagle-Picher have not stated claims on which relief can be granted.

Special Relationship.

Raymark and Eagle-Picher have, in this case, kept discussing an alleged "special relationship," i.e., certain special circumstances whose alleged existence fixes government liability. We must not forget, however, that absent an effective consent to be sued, the United States cannot be made a defendant, third party, or otherwise, in any court. The consents we operate under here are the Tucker Act and the FTCA. No others are alleged. The grievance seems to be in real terms that the United States knew more about the hazards

of asbestos than it ever disclosed to its suppliers. If, supposedly, they had known all the government knew, they would have gone out of the asbestos business at once, and saved themselves untold liability, or else would have purchased all the insurance available and passed the cost on to the United States and other customers in sharply higher prices.

On motion to dismiss or for summary judgment, we may have to suppress our wonderment that anyone could have known more about the hazards of asbestos than those responsible companies who used it as raw material in the production of insulation. We must assume the government did know things it did not reveal, and that it used a defective product in ways that added to the hazard, but were not known to suppliers. We must also disregard the results of actual trials which have dealt with this

imputation, as they are not part of the present record.

So far as this contention asserts an implied warranty, it is dealt with already in our section, supra. There is, also, case authority under the Tucker Act applying a different but related theory. Under these cases, nondisclosure to a bidder at the time of his bid of information essential to successful performance of the construction is treated at times as a breach. Examples are Hardeman-Monier-Hutcherson v. United States, 458 F.2d 1364 (Ct. Cl. 1972); J. A. Jones Constr. Co. v. United States, 390 F.2d 886 (Ct. Cl. 1968); Helene Curtis Industries, Inc. v. United States, 312 F.2d 774 (Ct. Cl. 1963). In American Ship Bldg. Co. v. United States, 654 F.2d 75 (Ct. Cl. 1981), the court set limits on the scope of breach liability for nondisclosure of superior knowledge. It held the

doctrine is generally applied when a contractor (1) undertakes to perform without vital knowledge of a fact that affects performance costs or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information. Since the government is entitled to presume that one who bids on a government invitation knows his own capabilities and has ascertained he will be able to produce, and at what cost, it would be up to the contractor, complaining of a breach by nondisclosure, to produce specific information to back up his contention.

The government might reasonably suppose Raymark and Eagle-Picher knew enough about asbestos and its perils not to need to

learn more about it from the government. They would after all not be held liable to pay anything on any asbestosis or lung cancer claims if they had not marketed a defective product. They say the buyer owed them a duty to tell them their product was defective, intrinsically or as actually used. Such a contention is new to the "superior knowledge" doctrine and does not fit it at all well. It does not deal, for example, with how the government is supposed to know the supplier of asbestos needs information about asbestos it does not have. Surely a statement by a supplier to the government when the material was delivered would have attracted notice and would not have been forgotten. We must presume that government officials acted in good faith, the contrary not being alleged. Acting in good faith, they could not have knowingly exposed their own employees to

undue asbestos hazards. Maybe they had a duty to know more than they did, e.g., to follow up clues to danger they actually had received. Raymark and Eagle-Picher have asserted then, not only a duty of the customer to inform the supplier that his product is defective, but a duty to find out what he does not already know. This does not fit the superior knowledge doctrine and cases exactly like a glove. Then there is the question what the contract specifications actually said that misled the contractor.

We think the case law dealing with a government breach of a contract by nondisclosure of superior knowledge cannot be made to support the claims here in suit without so drastic a restructuring that we would be engaging in judicial legislation. We note that the Supreme Court has recently considered the plight of a government con-

tractor exposed to liability to third persons from manufacturing defective products to government specifications. Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988). The Court extends the government's immunity to the contractor under carefully limited conditions in what is called the "government contractor defense." Before us the effort is to reduce the government's immunity and it appears logically inconsistent with the Supreme Court's approach. If the appellants Raymark and Eagle-Picher were really markedly exposed to Lopez and his future claims, and so many other claimants, by reason of conforming to government specifications and, if the otherwise carefully prescribed conditions are met, there should be no damage awards on which to base claims for government indemnity or contribution. There then is a conflict of logic between the government contractor

defense and the logic on which the third party alleged liability of the government here is based. This is a factor counseling caution when we are asked to extend Tucker Act liability on new and novel grounds, only superficially based on case law as known hitherto. We are not to be understood as saying the government contractor defenses ought to have defeated Lopez's claim. No such issue is before us and we do not pass upon it. Judge McGovern has held the contrary, chiefly on the ground the involved specifications displayed before him were performance, not design specifications.

Federal Tort Claims Act.

The district court also gave careful consideration to the Federal Tort Claims Act, which at 28 U.S.C. § 2674, makes the United States liable respecting tort claims to the same extent as a private individual

under like circumstances. By 28 U.S.C. § 1346(b), the circumstances must be that the supposititious private individual "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Since United States v. Yellow Cab Co., 340 U.S. 543 (1951), it has been settled that in a private tort case, a person may bring in the United States as third-party defendant for indemnity or contribution if the United States was wholly or in part at fault. As there has been no trial, the fault of the United States has not been determined, but a problem here is, assuming it was at fault, Lopez was one of its employees and it is provided by FECA, 5 U.S.C. § 8116(c), that the liability of the United States under that act to the injured employee or his legal representative, spouse, dependants, etc., shall be exclusive of all

other liability to such claimants "in a direct judicial proceeding."

The United States, as already stated, has recovered its compensation paid to Lopez because of his other recoveries, but this is not of legal importance. In Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983), the Supreme Court held that Lockheed, having been sued by the administrator of a deceased federal employee compensated under FECA, could implead the United States as a third-party defendant, and was not barred by section 8116(c). The result on remand would depend on the validity of the "underlying substantive claim," and was not decided. The district court and the parties assume that Lockheed does not make the United States liable in this case on the underlying claim, and that will depend on how one identifies the private individual and what

local law prescribes as to his liability. As to that, there are three theories that, (1) judge-made admiralty law will govern, (2) Lopez was a maritime worker and the liability would be that of a "negligent shipowner" under the Longshore and Harbor Workers Act, 33 U.S.C. § 901 and ff (LHWCA), because local law would have to step aside even though the injury was suffered in the State of Washington, and (3) the LHWCA does not apply and local Washington worker's compensation law will determine liability, because Lopez was not a maritime worker.

These issues are not confided to us, as Tucker Act claims are, as the intended sole source of appellate law, and as stated we look for guidance to Ninth Circuit case law, but such law does not take us to the end of our task. Before Hohri, the parties elaborately briefed this case, and at

impressive length, for the Ninth Circuit, whose tolerance for prolixity they must consider to surpass ours. They must have supposed, and by their arguments and citations obviously did suppose, that the Ninth Circuit would be unable to find guidance in its own precedents. Under the circumstances, we must try to determine what the Ninth Circuit would have decided.

(1) Theory 1 is that product liability can be asserted on behalf of a pipe fitter against a producer of unsafe asbestos products under traditional judge-made admiralty law, if the pipe fitter was building or repairing vessels on navigable waters. Presumably the manufacturer could then pursue indemnity from the United States under the Lockheed doctrine, and section 8116(a) would not suffice for a defense, so far as the vessels were government owned. This theory fails at its first

step, however, in the Ninth Circuit, which in two carefully considered decisions has held that admiralty jurisdiction is wanting (a) over new vessel construction, because new construction is traditionally nonmaritime and not subject to admiralty law, Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983), and (b) over vessel repair, so far as concerns product liability to a pipe fitter, at least, because to distinguish between the same pipe fitter's work over the years between his work on new vessels, and on repair, would be "a mechanical analysis" (and besides, one would think an unpracticable distinction to draw as a factual matter). Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984). The court relies on Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972), as authority to reject mere location on the water as

a test of maritime activity and to consider also the nature of the work the pipe fitter performs. Of course, in an office building it would be little different. The pipe fitter is not a seaman, nor does he do work traditionally done by seamen. The United States was not a party to those cases, so there is no question as to the jurisdiction of the Ninth Circuit to render the decisions. Authority from other circuits is not needed by us, but the Ninth Circuit itself cites Harville v. Johns-Manville Corp., 731 F.2d 775 (11th Cir. 1984), in which a still more elaborate analysis may be found. See also Austin v. Unarco Industries, Inc., 705 F.2d 1, 8 (1st Cir. 1983); Keene Corp. v. United States, 700 F.2d 836 (2d Cir.), cert. denied, 464 U.S. 864 (1983) ("where a group is composed of workers with and without maritime status [pipe fitters] Admiralty jurisdiction does

not exist as to the group." Id. at 844.) The Ninth Circuit has not taken this stand alone, and we have found no authority to the contrary, except White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). This decision, however, is followed by White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981), which denies the asbestos manufacturers indemnity for their tort liability from the shipyard involved, the Newport News Shipbuilding and Drydock Co., and thus they cannot invoke the Fourth Circuit for more than the first step where they need a second to be in a good position in this court. If our view matters, we agree with the Ninth Circuit that the first step fails: the pipe fitter's claim is not maritime whether he worked on new construction or repair of vessels.

(2) The LHWCA is a sweeping piece of legislation which, as amended in 1972, does two things -- first, it requires that employers of certain maritime and harbor workers, including those employed in "repairing or building a vessel" obtain insurance to protect their workers against disability or death incurred in course of employment, payable without fault (sections 903-904). An employer who fails to do this is liable under section 905(a) in law or admiralty and is denied several defenses. None of this applies directly to United States Government employees, such as Lopez, who have coverage under other law. Under section 905(b), in case of the "negligence of a vessel," the vessel may also be sued, the employer is not liable to the vessel, and the vessel's former absolute liability under "warranty of seaworthiness" is eliminated.

The asbestos manufacturer's argument is that Lopez worked for the United States in its capacity as a shipowner, and that a negligent private party, a shipowner, is the analogous private person whose liability is to be determined by the "law of the place" of 28 U.S.C. § 1346(b), the "law of the place" not being law of the State of Washington, where the Puget Sound Naval Shipyard is located, but the LHWCA. While the United States is not directly liable to its own civilian employees if injured on its vessels because of 5 U.S.C. § 8116(c), pursuant to the Lockheed doctrine it is liable for contribution on account of its own negligence if its employees are able to enforce liability against third persons for their injuries. According to this theory, recourse to state law is preempted because federal law, the LHWCA, covers the case.

There are numerous conceptual difficulties with this position. The hardest to overcome is, in our view, that section 905(b) is not coextensive in its coverage of employees with those for whom the employer must obtain coverage under section 903. Under that law, those engaged in shipbuilding are covered and must be insured. However, eligibility for worker's compensation under section 903 is not the same as, and may be broader than, general maritime jurisdiction. Rohde v. Southeastern Maritime Drilling Co., 667 F.2d 1215 (5th Cir. 1982). Negligence claims under section 905(b), are those covered by federal maritime principles. Richendollar v. Diamond M. Drilling Co., 819 F.2d 124 (5th Cir.), cert. denied, 108 S. Ct. 331 (1987); Drake v. Raymark Industries, Inc., 772 F.2d 1007, 1011 (1st Cir. 1985). If there was no intention to broaden the

coverage of the judge-made admiralty law concerning vessel "unseaworthiness," and we perceive none in the act, then all the regional circuit cases holding that suits by shipyard pipe fitters for asbestosis do not lie under admiralty principles, likewise preclude indemnity liability under section 905(b). The purpose of section 905(b) is shown in Drake to have been to lessen the vessel's liability for unseaworthiness as a matter of strict liability and to restrict such liability to cases of negligence. Accordingly, the First Circuit has followed its own Drake decision with In re All Maine Asbestos Litigation (PNS cases), 772 F.2d 1023 (1st Cir. 1985), cert. denied, 106 S. Ct. 1994 (1986), which deals with asbestos claims of federal employees, civil servants, rising out of their employment at the Portsmouth Naval

Shipyard. These claimants are, legally, identically situated with Lopez's claim.

The First Circuit passes over, as can we, whether an unequivocal consent to liability of the United States is expressed with respect to indemnification or contribution against claims by federal workers, where the LHWCA itself provides in 33 U.S.C. § 903(b) [§ 902(a)(2) before 1984]:

> No compensation shall be payable in respect to the disability or death of an officer or employee of the United States or any agency thereof.

As to this, we meet ourselves coming back as appellant refers us, of course, to the case of the private shipowner postulated under the FTCA whose employees are not federal employees. But if consent to indemnification claims is granted at all, under these circumstances, it is surely not granted unequivocally. Cf. United States v. Testan, 424 U.S. 392, 399 (1976). We

are inclined to believe that a suit for indemnification or contribution for liabilities incurred to federal employees for their breathing of asbestos, is unconsented even when the LHWCA is read with the FTCA to refer to a private employer.

In Amell v. United States, 384 U.S. 158, 163 (1966), it is held respecting pay claims of seamen who are civil servants employed on government-owned noncombat vessels, that Congress thought of them as government employees who happened to be seamen rather than as seamen who by chance worked for the government. The traditional exclusive admiralty jurisdiction of seamens' wage claims did not extend to them; they could sue under the Tucker Act like other civil servants. Accordingly, it would seem that Lopez was a civil servant rather than a longshore and harbor worker, for purposes of statutory coverage, that

is, the occasional situs of his work on shipboard does not establish LHWCA coverage.

We believe the Ninth Circuit would so hold, in view of its first step, respecting traditional admiralty coverage of pipe fitters working in shipyards, supra.

(3) If federal maritime jurisdiction fails, whether derived from judge-made admiralty law, or from the LHWCA, we agree with the trial court that one must look to the law of the State of Washington to determine whether

> the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

Under that law, the trial court convincingly shows that, absent any express contract commitment, an employer who carried appropriate workmen's compensation insur-

ance would not be liable to indemnify third parties who were obliged to pay damages to the worker for having negligently caused or contributed to his injury. We need not add anything to his able analysis and citations. We believe, moreover, the Ninth Circuit would extend to Judge McGovern's decision the customary deference when it is a matter of a United States District Judge construing the law of his home state. Of course, in case of any contract commitment, the result might be different, but then we have a case not sounding in tort, and it is the FTCA we are now construing.

Conclusion

Since the defendants/appellants, Raymark and Eagle-Picher, are unable to state a cause of action under either the Tucker Act or the FTCA against the United States as third-party defendant for indemnity or contribution, the decision of the United

States District Court for the Western District of Washington must be affirmed, and the United States dismissed as a party to the action.

AFFIRMED

APPENDIX 2

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

United States Court of Appeals for the Federal Circuit

87-1543, -1544

ALBERT LOPEZ and SHIRLEY LOPEZ,

Plaintiffs,

and

RAYMARK INDUSTRIES, INC. and EAGLE-PICHER INDUSTRIES, INC.

Defendants/Third-Party-Plaintiffs/ Appellants,

v.

A. C. & S., INC.; AMERICAN ASBESTOS TEXTILE CORP., a/k/a AMATEX CORP.; ARMSTRONG CORK, INC.; ASARCO, INC.; CAREY CANADA, INC.; THE CELOTEX CORP., successor in interest to PHILIP CAREY MANUFACTURING CO., PHILIP CAREY CORP., BRIGGS MANUFACTURING CO., and PANACON CORP.; COMBUSTION ENGINEERING INC.;

CROWN CORK & SEAL CO.; FIBREBOARD CORP.; THE FLINTKOTE CO.; FORTY-EIGHTY INSULATION, INC.; GAF CORP., successor by merger with RUBEROID CO.; GARLOCK INC. JOHNS-MANVILLE SALES CORP.; J.P. STEVENS, INC.; KEENE CORP., successor by merger with BALDWIN-EHERT-HILL a/k/a ASTEN HILL; NICOLET INDUSTRIES; OWENS-CORNING FIBERGLASS CORP.; OWENS-ILLINOIS CORP.; OWENS ILLINOIS GLASS; PITTSBURGH CORNING CORP,; RAYBESTOS-MANHATTAN; SOUTHERN TEXTILE; STANDARD ASBESTOS; UNION ASBESTOS; RUBBER CO., a/k/a UNARCO INDUSTRIES, INC.,

Defendants,

v.

UNITED STATES OF AMERICA,

Third-Party-Defendant/Appellee.

Before MARKEY, Chief Judge, RICH and ARCHER, Circuit Judges, NICHOLS and BENNETT, Senior Judges.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is, denied.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

November 21, 1988

cc: Philip A. Talmadge
Joe G. Hollingsworth
David S. Fishback
Paul A. Zevnik

APPENDIX 3

TITLE 28, UNITED STATES CODE

§ 1346. **United States as defendant**

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

. . .

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

§ 1346. **United States as defendant**

. . .

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2674. **Liability of United States**

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case, wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to

the persons respectively, for whose benefit the action was brought, in lieu thereof.

TITLE 33, UNITED STATES CODE

§ 902. **Definitions**

When used in this chapter --

. . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, . . .

. . .

(21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

§ 905. **Exclusiveness of liability**

. . .

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an

action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

REVISED CODE OF WASHINGTON

51.04.010 Declaration of police power -- Jurisdiction of courts abolished. The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced

the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.